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No. 97-____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION,

ABBOTT LABORATORIES, et al.,

Petitioners,

—v.—

HJB, INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTION PRESENTED

Whether a new exception to the "indirect-purchaser" rule of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), should be recognized, permitting indirect-purchasing retailers to recover overcharge damages against manufacturers alleged to have conspired in violation of section 1 of the Sherman Act, where:

(1) the alleged overcharge was first borne by direct-purchasing wholesalers;

(2) according to the Seventh Circuit, the direct-purchasing wholesalers may themselves sue to recover the entire amount of the overcharge (even though there is said to be evidence of their role as "reluctant accomplices" in the conspiracy);

(3) the manufacturers have given substantial consideration to the wholesalers for a release of any antitrust overcharge damage claims;

(4) there is no allegation that wholesaler markups were collusively set; and

(5) permitting indirect-purchasing retailers' damages claims would result in double recovery and would require determining how much of the alleged overcharge the wholesalers passed on to them?

PARTIES TO THE PROCEEDING

A list of the parties to the consolidated appeal in the Court of Appeals is set forth in Appendix K at 134a.

RULE 29.6 STATEMENT

Pursuant to Sup. Ct. R. 29.6, the following are Petitioners' parent and nonwholly owned subsidiary companies:

(1) Abbott Laboratories has no parent company. The nonwholly owned subsidiaries of Abbott Laboratories are TAP Holdings, Inc. and TAP Pharmaceuticals, Inc.;

(2) The pharmaceutical business and assets of Petitioner Ciba-Geigy Corporation have been merged with Petitioner Sandoz Pharmaceuticals Corporation and have been renamed Novartis Pharmaceuticals Corporation. The parent corporations of Novartis Pharmaceuticals Corporation are Novartis Finance Corporation, Novartis Corporation and Novartis AG. The nonwholly owned subsidiaries are Novartis Biotech Partnership, Inc. and Chiron Corporation;

(3) Forest Laboratories Inc. has no parent or nonwholly owned subsidiary companies;

(4) The parent corporation of G.D. Searle is Monsanto Company. G.D. Searle has no nonwholly owned subsidiaries;

(5) The parent corporations of Hoechst Marion Roussel, Inc. (formerly Marion Merrell Dow Inc.) are Hoechst AG, Hoechst Marion Roussel AG, HMR Pharma, Inc. and Hoechst Marion Roussel S.A. The nonwholly owned subsidiaries of Hoechst Marion Roussel, Inc. are Hoechst Marion Roussel Canada, Inc., Carderm Capital L.P., Marion Merrell et Cie (SNC), Marion Merrell Bourgoin S.A., Hoechst Marion Roussel S.p.A., Biosearch Italia S.p.A., Gruppo Lepetit S.p.A., Hoechst Marion Roussel S.A. (Belgium), Hoechst Marion Roussel S.A. (Spain), Marion Merrell S.A. (Spain) and Marion Merrell S.A. (France);

(6) Johnson & Johnson has no parent or nonwholly owned subsidiary companies;

(7) The parent corporation of Rhone-Poulenc Rorer Pharmaceuticals, Inc. is Rhone Poulenc S.A. Rhone-Poulenc Rorer Pharmaceuticals has no nonwholly owned subsidiaries;

(8) The parent corporation of Pharmacia & Upjohn Company (formerly The Upjohn Company) is Pharmacia & Upjohn, Inc. The nonwholly owned subsidiaries of Pharmacia & Upjohn Company are Upjohn Suzhou Animal Health Products Company Limited (China), Upjohn Suzhou Pharmaceutical Company Limited (China), SinoSwed Pharmaceutical Corp. (China), Pharmacia Limited (China), Pharmacia (China) Biotech Limited, Pharmacia (Hong Kong) Biotech Limited, P.T. Pharmacia & Upjohn Indonesia, Nuova ICC-Upjohn SpA (Italy), Korea Upjohn Limited, Pharmacia & Upjohn Allergon AB (Sweden), PharmaFrac AB (Sweden), Pharmacia & Upjohn, Inc., Yusafarm d.o.o. (Fed. Rep. Of Yugoslavia).

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No. 97-__

In The

Supreme Court of the United States
October Term, 1997

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION

ABBOTT LABORATORIES, et al.,

Petitioners,

—v.—

HJB, INC., et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Abbott Laboratories, et al.[1] respectfully pray that this Court issue a Writ of Certiorari to review the August 15, 1997 judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this matter.

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[1] The undersigned Petitioners are the manufacturer defendants that continue to litigate actively in the consolidated Sherman Act section 1 class action proceeding, currently pending in the district court; the other manufacturer defendants in the class action have settled their claims with class plaintiffs.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 123 F.3d 599, and is reproduced in Appendix ("App.") A at 1a-29a. The order of the Court of Appeals denying rehearing and rehearing en banc is not reported, and is reproduced in App. I at 131a-132a. The opinion of the United States District Court for the Northern District of Illinois is reported at 1996 WL 167350, and is reproduced in App. E at 45a-101a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 1997. Petitioners' timely petition for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals on October 8, 1997. The jurisdiction of this Court to review the judgment of the Court of Appeals by Writ of Certiorari is conferred by 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

This case involves Sherman Act section 1, 15 U.S.C. § 1, which is set forth in App. J at 133a.

STATEMENT OF THE CASE

A. Introduction

In *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), this Court established the rule that, in cases brought under section 1 of the Sherman Act, 15 U.S.C. § 1, only direct purchasers of the products subject to an illegal overcharge are permitted to sue for damages; remote purchasers are prohibited from doing so. This "indirect-purchaser" rule is based on this Court's desire (1) to spare courts the difficult (if not impossible) task of attempting to apportion overcharge damages among multiple tiers of distribution in complex antitrust cases; (2) to encourage private enforcement of the antitrust laws by concentrating the full recovery for the overcharge in direct purchasers; and (3) to prevent multiple recovery of damages against antitrust defendants. 431 U.S. at 733-48. In reaching its decision, the Court built on its reasoning in *Hanover Shoe, Inc. v. United Machinery Corp.,* 392 U.S. 481

(1968), which prohibited antitrust defendants from using a pass-on defense against direct-purchasing plaintiffs.

The Court strongly reinforced its commitment to the indirect-purchaser rule in *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), where the Court held that, although "[t]he rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases," the "possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." 497 U.S. at 216. Therefore, the Court warned, it is "unwarranted and counterproductive" to "litigate a series of exceptions" to the rule, even where "any [of the] economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case." *Id.* at 217.

Notwithstanding *Illinois Brick* and *Utilicorp*, the Seventh Circuit in this case created a new exception to the *Illinois Brick* indirect-purchaser rule and permitted indirect-purchasing retail drugstores to sue for damages, despite its own findings that (1) the alleged overcharge on branded prescription drugs occurred at the manufacturer level (and there was no allegation of collusion with respect to the wholesalers' markups); (2) the alleged overcharge was borne in the first instance by the direct-purchasing wholesalers; (3) the wholesalers are entitled to sue the manufacturers for overcharge damages (even though the evidence depicts them, at worst, as "reluctant" participants in the manufacturers' conspiracy); (4) the manufacturers "settled" with the wholesalers; and (5) calculating indirect-purchaser damages would require the type of "pass-on" analysis that *Illinois Brick* forbids. These findings should have led the Seventh Circuit to bar the indirect-purchasing drugstores' claims under *Illinois Brick* and *Utilicorp*.

The Seventh Circuit also reasoned that the viability of the indirect-purchasing retailers' damages claims *depends* on whether or not the manufacturers settle with the wholesalers: if no settlement is reached, the retailer claims are barred (and only the direct-purchasing wholesalers have the right to seek damages); if a settlement is reached, then the indirect-purchasing retailer claims are somehow activated.

The Seventh Circuit's opinion constitutes a radical departure from the principles established by this Court in *Hanover Shoe*, *Illinois Brick* and *Utilicorp*. If allowed to stand, it would permit both direct and indirect purchasers to recover damages, thereby sanctioning duplicative recovery of damages, and it would risk opening the floodgates to indirect purchaser litigation involving just the types of difficulties and uncertainties that this Court consistently has sought to avoid.

B. Factual Background

1. The Nature of Branded Drugs and the Impact of Managed Care on Branded Drug Pricing

Petitioners are manufacturers of brand name prescription drugs (or "branded drugs").[2] Respondents are retail pharmacies, both independents and large chains, which sell branded drugs in the United States.[3] Approximately 80 to 90% of Respondents' aggregate purchases of branded drugs are from wholesalers, not directly from manufacturers. *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 1996 WL 267752, at *3 (N.D. Ill. May 17, 1996) (App. 39a); (Doc. 3 at ¶ 73(e)).[4]

Branded drugs are unlike most other consumer goods. Although the patient is the ultimate consumer, neither the patient nor the pharmacist is permitted by law to select the chemical entity

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[2] As defined by Respondents, a brand name prescription drug is a drug that is sold under a brand name rather than its generic or chemical name. *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 1996 WL 167350, at *32 n.3 (N.D. Ill. Apr. 4, 1996) (App. 46a).

[3] In 1994, the Judicial Panel for Multidistrict Litigation transferred over 100 actions by retail pharmacies to the United States District Court for the Northern District of Illinois for coordinated or consolidated proceedings. The district court certified a nationwide class of retail pharmacy plaintiffs, which alleges violations of section 1 of the Sherman Act, 15 U.S.C. § 1. Other retailers chose to opt out of the class, and are pursuing Sherman Act claims and price discrimination claims under the Robinson-Patman Act, 15 U.S.C. §§ 13 (a), (d) and (f); Robinson-Patman Act claims are not the subject of this petition.

[4] Throughout this Petition, citations to cases are to the official or on-line reporter, and then to the corresponding page(s) in the Appendix. Citations in the form "Doc. __" are to documents included in the record on appeal.

to be dispensed; only the physician does that. 1996 WL 167350, at *13 (App. 68a); (Doc. 2047 at ¶ 62). Thus, the retail druggist typically has served as a passive dispenser of branded drugs selected by physicians.

This traditional model of drug selection by doctors and distribution by retail druggists, as well as the delivery of healthcare generally, has changed dramatically with the growth of managed care. (Doc. 2047 at ¶¶ 21, 23; Doc. 2048 at ¶¶ 35-49, 52-61.) Managed-care organizations typically contract with employers to provide healthcare services to covered employees in return for premiums from the employer (often supplemented by employee contributions). (Doc. 2047 at ¶¶ 8-9; Doc. 2048 at ¶ 35.) In order to maximize their profitability, managed-care organizations seek to ratchet down the cost of healthcare goods and services. One way they often do so is by requiring doctors, hospitals, pharmacies and others to grant price concessions in return for the privilege of servicing the patients they control. (Doc. 2047 at ¶¶ 23-24; Doc. 2048 at ¶¶ 52-61, 80.) Doctors, hospitals and even retail pharmacies charge less for their services to managed-care patients than to other patients. (Doc. 2047 at ¶¶ 30, 32-34; Doc. 2048 at ¶¶ 52-53, 55-61, 74.)[5] Thus, the retail pharmacies themselves engage in the very same type of differential pricing that they challenge in this case.

Managed-care organizations also have extracted price concessions from pharmaceutical manufacturers. (Doc. 2047 at ¶ 34; Doc. 2430 at 14.) As the district court found, "substantial evidence" showed that managed-care organizations "possess considerable influence over the prescribing decision." (Doc. 2430 at 14.) This power derives from the ability of managed-care

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[5] This Court and a number of the circuit courts have recognized the ability of managed-care organizations to obtain lower prices from retail drug stores. *See, e.g., Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 227-28 (1979); *see also Medical Arts Pharmacy, Inc. v. Blue Cross & Blue Shield, Inc.*, 675 F.2d 502, 503-07 (2d Cir. 1982); *Sausalito Pharmacy, Inc. v. Blue Shield*, 544 F. Supp. 230, 232 (N.D. Cal. 1981), *aff'd*, 677 F.2d 47 (9th Cir.), *cert. denied*, 459 U.S. 1016 (1982).

organizations to regulate access to patients. Managed-care organizations thus are able to set up bidding situations between manufacturers of therapeutically similar branded products, inter alia, by using lists of preferred products (called formularies) to favor the most cost-effective product with its patients. (Doc. 2047 at ¶¶ 36-37, 39-42, 44, 48-49, 51, 52.) The district court recognized that a manufacturer's decision to discount to managed-care entities "is often a response to competitive pressures and reflects the epitome of a competitive system." *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, MDL 997, 1996 WL 167347, at *6 (N.D. Ill. Apr. 4, 1996) (opinion regarding proposed settlement).

In contrast, the manufacturers believed that retailers simply did not have the same leverage over doctors that managed-care organizations possessed. As the district court observed, the manufacturers presented evidence that "no retailer has noticeably reduced its sales following a manufacturer's refusal to offer a discount," whereas many managed-care plans had done so. 1996 WL 167350, at *13 (App. 68a).

The price concessions that managed-care organizations negotiate are delivered by the manufacturers in at least two different ways. *Id.* at *21 (App. 82a-83a); (Doc. 2017A at ¶¶ 15-16). The first is through "chargebacks." Under a chargeback arrangement, the wholesaler honors the discount separately negotiated between the manufacturer and the managed-care organization, and sells to the managed-care organization at the discounted price *plus* the wholesaler's separately negotiated markup. 1996 WL 167350, at *21 (App. 82a). The manufacturer has no involvement in the negotiation of the markup between the wholesaler and the managed-care organization. *Id.* The manufacturer subsequently makes the wholesaler whole for the amount of the discount.[6] The second method of delivering price

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[6] The Seventh Circuit was careful to note that price differentiation does not necessarily indicate collusion. *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 603 (7th Cir. 1997) (App. 3a–4a). Thus, in a multi-price system in which some consumers "are less able to resist high prices

concessions is through rebates, which manufacturers provide directly to managed-care organizations, thereby bypassing the wholesaler altogether. *Id.* at *21 (App. 82a).

2. The Role of Wholesalers in the Distribution of Branded Drugs

Pharmacies derive significant benefits by purchasing from wholesalers. For example, they are able to deal with one or a few local suppliers instead of many manufacturers, and they can place smaller orders with wholesalers at a lower cash outlay. (Doc. 2017A at ¶¶ 7-9.)

As the district court found, each wholesaler's markup on branded drugs "[is] determined by the [wholesaler's] customer and wholesaler *without participation by any manufacturer*." 1996 WL 167350, at *21 (App. 82a) (emphasis added). Respondents did not claim that wholesalers' markups on their branded-drug sales to retailers were uniform or collusive.

3. The Alleged Conspiracy

Respondents posit a conspiracy among the manufacturers to impose an overcharge on the prices paid by wholesalers for branded drugs eventually sold to Respondents, and to charge lower, discounted prices to managed-care organizations. 1996 WL 167350, *1, *32 n.7 (App. 46a-47a, 48a n.7). The overcharge is alleged to have originated at the manufacturer level. As the Seventh Circuit confirmed: "The plaintiffs' complaint is that they were overcharged because the wholesalers passed on to them the overcharge that the wholesalers had to pay the manufacturers by virtue of the price-fixing conspiracy." 123 F.3d at 606 (App. 8a).

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than others," and where sellers each have "some monopoly power [patents, etc.] [allowing them to] price discriminate unilaterally" — precisely the economic environment that Petitioners argue exists in the branded pharmaceutical market — the use of chargebacks would be economically sound. 123 F.3d at 603 (App. 4a); *see also Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1340 (7th Cir. 1986) (competition "often works through 'discriminatory' chiseling down of prices").

As to the direct-purchasing wholesalers, Respondents allege that they joined the conspiracy by agreeing to employ chargebacks in order to shore up the manufacturers' collusive price differentiation, which in turn helped keep prices higher than they otherwise might have been. *See id.* at 614 (App. 25a). And, as noted, there is no allegation of collusion (vertical or horizontal) with regard to the wholesalers' markup.

The manufacturers vigorously deny Respondents' allegations and contend that (1) their behavior was not uniform, (2) pricing decisions were motivated by each company's independent assessment of the ability of managed-care organizations and retail drugstores to influence sales of its products, and (3) retail drugstores did receive discounts on branded drugs from various manufacturers in certain instances where the manufacturer believed that retailers might have some ability to influence prescription writing for the product in question.[7]

C. Proceedings Below

1. The Opinion of the District Court

In November 1995, the manufacturers and wholesalers filed separate motions for summary judgment. The manufacturers also filed a separate motion for summary judgment dismissing Respondents' "indirect-purchaser" claims under *Illinois Brick*. The district court ruled on all of these motions in an opinion dated April 4, 1996. 1996 WL 167350, at *1 (App. 45a).

a. The District Court Granted the Wholesalers' Summary Judgment Motion, Finding That There Was No Evidence That the Wholesalers Participated in Any Conspiracy

The district court found no evidence of a conspiracy involving the wholesalers. *Id.* at *20 (App. 80a). The court found

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[7] Petitioners nevertheless assume for purposes of this Petition the existence of the conspiracy alleged by Respondents.

that wholesalers set their prices independently, "without participation by any manufacturer," *Id.* at *21 (App. 82a), and that "in the entirety of this massive record" there is no evidence that the wholesalers had anything to do with manufacturer discounting decisions. *Id.* at *20 (App. 80a). The court rejected plaintiffs' contention that participation in chargeback transactions was evidence of wholesaler participation in the alleged conspiracy. *Id.* at *21-*24 (App. 82a-87a).

b. The District Court Denied the Manufacturers' Summary Judgment Motions on the Conspiracy Issue

In considering the manufacturers' summary judgment motions, the court found that "[plaintiffs failed] to come forward with significant direct evidence of a conspiracy." *Id.* at *6 (App. 55a). Nevertheless, the court denied the manufacturers' motions, focusing on what it characterized as the "striking" similarities in the manufacturers' discounting practices,[8] purported evidence of "mutual awareness [among the manufacturers] of each others' policies," the "creation and maintenance of the chargeback system," and opportunities to conspire (e.g., industry seminars, trade association meetings, and third-party data collection services). *See id.* at *6, *8, *10-*11 (App. 56a, 59a, 63a-64a).

Notwithstanding evidence that each manufacturer plausibly believed that retailers could not sufficiently influence the prescribing of most or all of its branded drugs to warrant discounts, the court effectively denied summary judgment because it found an issue of fact regarding whether retailers did have some ability to influence the prescribing of branded drugs. *Id.* at *15 (App. 71a).

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[8] The district court at several points accepted Respondents' assertion that, in effect, manufacturers uniformly declined to give price concessions to retailers. 1996 WL 167350, at *7-*8, *15 (App. 58a-59a, 72a). Nonetheless, the court also recognized that at least eighteen of the manufacturers had offered discount programs on branded drugs to retail drug stores. *Id.* at *17, *32 n.20 (App. 75a).

c. The District Court Held That the "Owned or Controlled" Exception to *Illinois Brick* Applied in This Case

Despite holding that the wholesalers were not members of any alleged conspiracy, the district court nevertheless decided that *Illinois Brick* did not preclude recovery by Respondents in this case.

The court relied on the "owned or controlled" exception set forth in footnote 16 of the *Illinois Brick* opinion. The court applied the exception because, in its view, the manufacturers exercised a "degree of control" over the wholesalers in the distribution process that "effectively transforms the transaction — from defendant to middleman to indirect purchaser — into one sale." *Id.* at *29 (App. 95a); *see also id.* at *29-*32 (App. 96a-100a). Specifically, the district court found that manufacturers decided which of the wholesalers' customers would receive manufacturers' discounts and negotiated those discounts directly with those managed-care customers. *Id.* at *30 (App. 96a-97a). With respect to those customers, the court concluded that the "relationship unifies into one sale." *Id.* at *31 (App. 99a). As to retailers, the court wrote that a wholesaler's markup over its acquisition cost is "a relatively modest portion of the total cost of the drugs to the purchaser" and that wholesalers "were not in a financial position" to reduce their prices to retailers without some reduction in manufacturers' selling prices to wholesalers. *Id.* at *30-*31 (App. 98a). On this basis, the court found that manufacturers had "control" over wholesaler's sales to retailers as well. *Id.* at *30-*32 (App. 98a-100a).

On May 16, 1996, the district court certified for interlocutory appeal, under 28 U.S.C. § 1292 (b), the question of the applicability of the *Illinois Brick* "owned or controlled" exception to the facts of this case. 1996 WL 267752 (App. 35a). On May 16, 1996, the district court also entered a judgment in favor of the wholesalers under Rule 54 (b) of the Federal Rules of Civil Procedure. *Id.* The manufacturers moved the Seventh Circuit to hear the appeal on the "owned or controlled" issue. This motion was granted on July 8, 1996. (App. 33a-34a). Class

plaintiffs meanwhile filed a notice of appeal with respect to the judgment exonerating the wholesalers. These appeals, as well as certain others, were consolidated by the Seventh Circuit by order dated May 9, 1997. (App. 30a-32a.)

2. The Opinion of the Court of Appeals

The Seventh Circuit issued its opinion on August 15, 1997. 123 F.3d 599 (App. 1a-29a).

As an initial matter, the Seventh Circuit reversed the grant of summary judgment in favor of the wholesalers, believing that there was enough evidence to create a jury issue as to whether the wholesalers were the manufacturers' "cats–paws," that is, "reluctant accomplices," acting as "agents of [the] manufacturers' cartel." *Id.* at 615 (App. 25a-26a).[9]

On the *Illinois Brick* issue, the Seventh Circuit reversed the district court with respect to the "owned or controlled" exception, holding that there is no evidence that any of the manufacturers either own or control any of the wholesalers. *Id.* at 605-06 (App. 7a-8a).

But the Seventh Circuit did not end its *Illinois Brick* analysis there. Despite the fact that it had ordered the parties to limit briefing to the applicability of *Illinois Brick* where the direct purchasers "are separate companies neither owned by any manufacturer nor co-conspirators of any manufacturer," (App. 31a), the court nevertheless went on to consider the impact under *Illinois Brick* of a finding of wholesaler involvement in the alleged collusion.

In this connection, the Seventh Circuit made a number of findings relevant to the *Illinois Brick* issue:

(1) Respondents' "complaint is that they were overcharged because the wholesalers passed on to them the

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[9] The Seventh Circuit's ruling on the wholesaler judgment is the subject of a separate petition for a Writ of Certiorari by the wholesalers.

overcharge that the wholesalers had to pay the manufacturers by virtue of the price-fixing conspiracy," 123 F.3d at 606 (App. 8a);

(2) Respondents' "pass-on" claim "is just the kind of complaint that *Illinois Brick* bars," *id.*; and

(3) the direct-purchasing wholesalers are "entitled" to sue for damages, despite their participation in the posited collusion. *Id.* at 615 (App. 27a).[10]

Reinforcing these points, the Seventh Circuit also reiterated the core holding of *Illinois Brick* and its application to this case:

> The only entities permitted to complain about the manufacturers' overcharging the wholesalers are the wholesalers themselves, the direct purchasers, even if every cent of the overcharge was promptly and fully passed on to the pharmacies in the form of a higher wholesale price.

Id. at 606 (App. 8a-9a).

The court later stated, however, that "if the plaintiffs went on to obtain a judgment against the wholesalers and manufacturers, any indirect-purchaser defense would go by the board, since the pharmacies would then be direct purchasers from the conspirators." *Id.* at 604 (App. 6a). Although the court's reasoning is difficult to follow, the Seventh Circuit attached significance in this connection to the fact that the wholesalers, in return for substantial consideration, had released their claims against the manufacturers:

> Some wholesalers were plaintiffs in this litigation; they settled. Had they not done so, and had the case proceeded to trial and the pharmacies been permitted to seek damages for the amount of the overcharge passed on to

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[10] Here, the Seventh Circuit apparently relied upon the holding of this Court in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), which held that an antitrust conspirator may sue upstream coconspirators, at least where it had a subordinate role in the challenged activity.

> them, the court would have had to apportion the overcharge between the wholesalers and the pharmacies. That's just what the Supreme Court in *Hanover Shoe*, *Illinois Brick*, and *Utilicorp* told the federal courts not to do.

Id. at 606 (App. 9a).[11]

Thus, under the Seventh Circuit's rationale, the viability of Respondents' damage claims appears to depend on whether or not the manufacturers settle with the wholesalers: If there is no settlement, Respondents' claims are barred (and the wholesalers have the right to seek damages, despite being "cats–paws"). If a settlement is reached, however, then Respondents' claims somehow are activated.

The Seventh Circuit did not explain how the wholesalers' release of the manufacturers might bear on the problem of "[t]racing a price hike through successive resales" from manufacturer to wholesaler to retailer — a question it characterized as "famously difficult." *Id.* at 605 (App. 7a). Likewise unexplained was how permitting indirect-purchaser suits as soon as the direct purchasers have released their claims squares with the prohibition against duplicative recovery under Clayton Act section 4 or with the policy of providing direct purchasers an incentive to sue for illegal overcharges.

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[11] Although the Seventh Circuit appeared to believe otherwise, the wholesalers have never been plaintiffs in this litigation. Seven wholesalers originally were sued by the class plaintiffs, and they continue to be defendants to this day. (Doc. 3 at ¶¶ 52-58.) Recognizing their *Illinois Brick* problem, plaintiffs originally attempted to secure (in return for a dismissal from the lawsuit) an assignment from the wholesalers of their claims against the manufacturers. Instead, for substantial consideration, the wholesalers entered into a judgment sharing agreement with the manufacturers in which, inter alia, the wholesalers released antitrust claims against the manufacturers. *In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1995 WL 221853, at *1, *4 n.2 (N.D. Ill. Apr. 11, 1995) (App. 103a-104a, 106a n.2). Thus, the Seventh Circuit is correct that at least the claims of the seven wholesalers in this case have been "settled."

REASONS FOR GRANTING THE WRIT

The Seventh Circuit's ruling is a frontal challenge to the indirect-purchaser doctrine set forth in *Hanover Shoe, Illinois Brick* and *Utilicorp*. There is no authority supporting the new "exception" that the Seventh Circuit has created. Indeed, in ruling that both direct and indirect purchasers may sue to recover the same overcharge, the Seventh Circuit's decision conflicts with every other court which has considered the question. Moreover, the court's decision (1) will require the district court to conduct an incidence (pass-on) analysis — something this Court has repeatedly forbidden the federal courts to undertake — to determine how much, if any, of the alleged overcharge has been passed on from wholesalers to the indirect-purchasing retailers; (2) guts this Court's policy of encouraging direct purchasers to sue for overcharges they passed on to others because, according to the Seventh Circuit's analysis, the moment that such direct purchasers settle with conspiring manufacturers, they make themselves subject to suit as alleged coconspirators by the indirect purchasers; (3) permits multiple levels of purchasers to sue for overcharge damages (in conflict with the holdings of this Court and decisions in other Circuits) thereby making duplicative recovery almost inevitable; and (4) renders the rights of indirect-purchasing plaintiffs dependent on whether or not settlement agreements have been reached among putative coconspirators.

This is probably the largest antitrust case in history, a case in which Respondents seek damages of many billions of dollars, and one with significant implications for the role of managed care in the nation's health-care system. But the main reason why the petition should be granted is that the Seventh Circuit's ruling threatens to open a gaping hole in the *Illinois Brick* doctrine, as class action plaintiffs discover that the policies underlying *Hanover Shoe*, *Illinois Brick* and *Utilicorp* go out the window as soon as direct purchasers are alleged to be "part of the conspiracy."

I. THE SEVENTH CIRCUIT'S OPINION CREATES A NEW EXCEPTION TO THE INDIRECT-PURCHASER RULE OF *HANOVER SHOE*, *ILLINOIS BRICK* AND *UTILICORP*

In *Hanover Shoe*, this Court ruled that direct purchasers are entitled to recover the entire amount of an overcharge in a Sherman Act suit even if all or a portion of that overcharge was passed on to their customers. This Court's rejection of a so-called "pass-on" defense was based on the desire to avoid needlessly complicating antitrust enforcement by requiring an apportionment of damages among different tiers of purchasers. 392 U.S. at 493-94.

Following the logic of *Hanover Shoe*, in *Illinois Brick*, this Court held that only direct purchasers may pursue overcharge damage claims arising from an antitrust violation. This Court reasoned that (1) apportioning damages among different levels of the distribution system "would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness;" (2) permitting indirect purchasers to sue would subject the defendants to the risk of multiple liability; and (3) "antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchaser rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." 431 U.S. at 735-38.

Subsequently, in *Utilicorp*, this Court emphasized its commitment "not to 'carve out exceptions to the [*Illinois Brick*] rule for particular types of markets.'" 497 U.S. at 216. *Utilicorp* specifically disagreed with the Seventh Circuit's decision in *Illinois v. Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir. 1988), which had carved out an exception to *Illinois Brick* in a case where direct-purchasing public utilities had passed on most or all of an overcharge to their customers. Instead, this Court held that "even assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions." *Utilicorp*, 497 U.S. at 217.

The Court further held that, although "[t]he rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases," the "possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *Id.* at 216. In this case, the Seventh Circuit has purported to discover yet another exception to *Illinois Brick*.

A. The Seventh Circuit's Opinion Requires the Trier of Fact to Perform the "Pass-On" Analysis That This Court Has Forbidden

1. The Seventh Circuit Acknowledges This Is an Overcharge Case Subject to *Illinois Brick*

The Seventh Circuit made several findings that *should* have led it to bar Respondents' claims under the clear holdings of *Illinois Brick*.

First, the Seventh Circuit acknowledged that this case is about an alleged manufacturer-level overcharge: "the plaintiffs' complaint is that they were overcharged because the wholesalers passed on to them the overcharge that the wholesalers had to pay the manufacturers by virtue of the price-fixing conspiracy."[12] 123 F. 3d at 606 (App. 8a); *see also id.* at 604. (App. 4a-5a)

In such a case, the Seventh Circuit recognized, the direct purchaser is given the exclusive right to sue for damages.

> [Plaintiffs' claim here] is just the kind of complaint that *Illinois Brick* bars. The only entities permitted to complain about the manufacturers' overcharging the wholesalers are the wholesalers themselves, the direct purchasers, even if every cent of the overcharge was

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[12] Respondents did not assert damages based on lost business opportunities, for such a theory requires individual proof, not classwide proof. 123 F.3d at 606 (App. 9a-10a). Thus, the Seventh Circuit rejected plaintiffs' attempts belatedly to posture their claim as a boycott or a refusal to deal case. *Id.* Nor is this a resale-price maintenance case (where there is an agreement on the wholesaler margin); there has never been an allegation that wholesaler margins were collusively set. *See* 1996 WL 167350, at *21 (App. 82a).

> promptly and fully passed on to the pharmacies in the form of a higher wholesale price.

Id. at 606 (App. 8a-9a).[13]

As noted above, one of the significant policy reasons for this rule is that, in order to allow indirect purchasers to recover, the trier of fact must, initially, determine the overcharge from the manufacturer to the wholesaler and, next, calculate the amount of overcharge, if any, passed on by the wholesaler to the indirect purchaser. Yet, as admitted by the Seventh Circuit elsewhere in its opinion, this type of incidence analysis is "famously difficult," and is precisely what "the Supreme Court in *Hanover Shoe*, *Illinois Brick*, and *Utilicorp* told the federal courts not to do." *Id.* at 606 (App. 9a).

Second, the Seventh Circuit held that the wholesalers are "entitled" to sue the manufacturers, despite their alleged participation in the conspiracy, *Id.* at 615 (App. 27a), apparently relying on *Perma Life Mufflers,* 392 U.S. at 134 (antitrust conspirator may sue upstream coconspirators where it had a subordinate role in the challenged activities).

The fact that the wholesalers are permitted to sue for damages (and in fact released those claims, for substantial consideration), combined with the need to perform an incidence analysis to assess Respondents' damages, dictates that Respondents' claims be barred under *Illinois Brick.* Such an outcome would be consistent with the black-letter rule and the policy considerations underlying *Illinois Brick* and *Utilicorp.*

Apparently ignoring both law and policy, however, the Seventh Circuit stated that if the Respondents "obtain a judgment against the wholesalers and manufacturers, any indirect-purchaser

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[13] The only possible exception to this bright-line rule that this Court has recognized was set forth in *Utilicorp*: "[W]e *might* allow indirect purchasers to sue *only* when . . . the direct purchaser will bear no portion of the overcharge and otherwise suffer no injury." 497 U.S. at 218 (emphasis added). Here, the Seventh Circuit made nothing even remotely approaching such a finding, nor could it.

defense would go by the board." 123 F.3d at 604 (App. 6a). The court offered no explanation as to how the above-noted factors — dictating application of the *Illinois Brick* rule — somehow are negated if a judgment is secured against the wholesalers. For example, such a judgment would not eliminate the need to trace the pass-on from manufacturer to wholesaler to retailer — an analysis that, as the Seventh Circuit acknowledged, "the Supreme Court . . . told the federal courts not to do." *Id.* at 606 (App. 9a).

2. The Three Cases Cited by the Seventh Circuit in Support of Its New Exception Are Inapposite

The Seventh Circuit cited three cases in support of its assertion that a finding of wholesaler complicity would suspend the indirect-purchaser defense — *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208 (9th Cir. 1984), *cert. denied*, 469 U.S. 1197 (1985); *Fontana Aviation Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980); and *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980). The court did not explain how these cases support its holding.

In fact, none of the cases supports the proposition that the presence of coconspiring middlemen (especially middlemen who, as the appellate court assumed here, may seek damages themselves) somehow nullifies this Court's condemnation of double recovery and "pass-on" analysis in *Illinois Brick* and *Utilicorp*. Indeed, none of the cases cited by the Seventh Circuit even attempt to analyze the *Illinois Brick* "factors" — the desire to avoid a pass-on analysis, the danger of multiple liability, and the encouragement of antitrust enforcement by placing the remedy in the hands of the direct purchasers — in the vertical "coconspirator" context. And none of the cases involve settlements of the type at issue here. In ruling that both direct and indirect purchasers may sue to recover the same overcharge, the

Seventh Circuit's ruling conflicts with each and every other court which has considered the question.[14]

Shamrock supports the view that such claims would continue to be barred under *Illinois Brick*. Like Respondents here, the *Shamrock* plaintiffs originally sought to recover damages barred by *Illinois Brick*:

> The consumers do not dispute that at the initiation of their suit, their focus was on a wholesale price-fixing conspiracy. Because this theory of necessity implies a pass-on of damages to the retail level, the consumers do not dispute that *Illinois Brick* would preclude their recovery on their original theory . . .

Shamrock, 729 F.2d at 1211. The *Shamrock* plaintiffs avoided the *Illinois Brick* bar by changing their theory to allege a conspiracy *directly* to fix prices at the retail level. *Id.* The Respondents here have not, and cannot, allege such a direct price-fixing scheme, for the district court recognized that the wholesalers' markups are *not* subject to any collusive agreement, and are competitively set. 1996 WL 167350, at *21-*22, *25-*26 (App. 82a-83a, 90a-91a).

The *Fontana* case is inapposite; it involved a conspiracy to exclude a competitor, not an alleged two-tier conspiracy to overcharge a customer. Moreover, the plaintiff in *Fontana* sought damages resulting from the alleged destruction of its business, not from indirect overcharges passed on to it. 617 F.2d at 480-81. It was simply not possible for the type of damages alleged in *Fontana* to be passed on; they were sustained, if at all, only by the plaintiff.

In the *Beef Industry* case, the court never reached the issue of whether *Illinois Brick* applies where direct purchasers are alleged to be participants in a multi-level conspiracy; the court

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[14] In addition to the authorities discussed herein, *see also, e.g., Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc.*, No. 95-1411, 1997 WL 686013, at *11 (10th Cir. Oct. 28, 1997) (courts apply *Illinois Brick* to bar indirect or secondary purchaser claims because the intermediary direct purchaser is not precluded from bringing a similar action).

held only that the issue could not even be considered where the middlemen were not joined as defendants. 600 F.2d at 1160-61. But as this Court later warned in *Utilicorp*, joining all of the direct and indirect purchasers together in the same lawsuit does not solve the *Illinois Brick* problem. 497 U.S. at 213. That is especially true if, as the Seventh Circuit indicated here, the middlemen may be coconspirators and plaintiffs at the same time.

Petitioners do *not* assert that *Illinois Brick* bars other, more plausible claims by purchasers from an alleged vertical conspiracy (and there is no need for this Court to address the full scope of the so-called coconspirator exception to *Illinois Brick* in normal vertical cases). For example, where suppliers and dealers are alleged directly to have fixed minimum *resale* prices, as in *Shamrock*, the overcharge is borne directly by the dealer's customers and there is no need to conduct a pass-on analysis. But, as the Seventh Circuit found, this case raises each and every one of *Illinois Brick*'s policy concerns. This case involves an alleged overcharge that originated at the manufacturer level, was imposed directly on the wholesalers (even though they were said to be aiders and abetters), and was passed on in whole or in part to the Respondents. *Id.* (App. 8a-9a). Unlike a minimum retail price maintenance scenario, the wholesalers' and retailers' claims would involve the same manufacturer overcharge. This is a classic situation requiring application of the *Illinois Brick* bar. To hold otherwise would risk multiple liability and ensnare the courts in "litigating a series of exceptions" that this Court has warned against in no uncertain terms.

3. The "Settlement" Between the Manufacturers and the Wholesalers Should Not Change the *Illinois Brick* Analysis

The Seventh Circuit seemed to condition Respondents' ability to sue on whether or not the manufacturers have settled with the wholesalers:

> Some wholesalers were plaintiffs in this litigation; they settled. Had they not done so, and had the case proceeded to trial and the pharmacies been permitted to seek damages

> for the amount of the overcharge passed on to them, the court would have had to apportion the overcharges between the wholesalers and the pharmacies. That's just what the Supreme Court in *Hanover Shoe*, *Illinois Brick*, and *Utilicorp* told the federal courts not to do.

Id. (App. 9a).

Thus, under the Seventh Circuit's formulation, if the manufacturers do not settle with the wholesalers, Respondents' claims are barred under *Illinois Brick*; however, if the manufacturers *do* settle with the wholesalers, Respondents' claims somehow are activated.

Not surprisingly, the Seventh Circuit provided no explanation — much less authority from this or any other court — as to how the manufacturers' settlement with the wholesalers (for substantial consideration) in any way impacts the *Illinois Brick* analysis. No such authority exists. Whether or not a settlement is reached, a court entertaining an indirect purchaser claim would still be required to engage in the pass-on analysis forbidden under *Illinois Brick* and *Utilicorp*. This Court has made clear that in an overcharge case the direct purchasers, and only the direct purchasers, are authorized to sue for damages. *Illinois Brick*, 431 U.S. at 735. The direct purchasers are free to settle their claims, or not sue at all; in neither event is the indirect purchaser suddenly permitted to sue. *See, e.g., Carter v. Berger*, 777 F.2d 1173, 1175 (7th Cir. 1985) ("The response of antitrust law [to a pass-on claim] is stark: the direct purchaser recovers from the wrongdoer the full overcharge, trebled, even if it also recovered the whole overcharge by raising its own prices. The indirect purchaser recovers nothing, even if it bore the whole overcharge and even if the direct purchaser did not sue." (citation omitted)).

The Seventh Circuit's ruling conflicts with that of the D.C. Circuit in *Adams v. Pan American World Airways, Inc.*, 828 F.2d 24 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 934, *and cert. denied*, 485 U.S. 961 (1988), which held, based on *Illinois Brick*, that settlement by a party directly affected by an antitrust violation cannot and does not confer standing on more remote parties:

> Nor is it an answer that [directly affected parties] have already settled their claims. Standing must be determined by uniform principles, not by accidents of sequence. A rule opening the door to marginal plaintiffs after settlement would virtually force defendants not to settle until all possible complainants were brought into the action or until the statute of limitations had run. Such behavior would clearly make it more difficult to prosecute antitrust violations and "undermine[ ] the effectiveness of treble-damages suits." *Associated General*, 459 U.S. at 545, 103 S.Ct. at 912. Besides, allowance of the present suit would unequivocally expose defendants to the risk of multiple liability, an alternative the Court has emphatically rejected. *Illinois Brick*, 431 U.S. at 730-31, 97 S.Ct. at 2066-67 (citing *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264, 92 S.Ct. 885, 892, 31 L.Ed.2d 184 (1972)). *See also id.* at 731 n. 11, 97 S.Ct. at 2067 n. 11 (recognizing that risk of multiple liability is particularly great where some parties settle).

828 F.2d. at 31.

B. The Seventh Circuit's Opinion Endorses Duplicative Recovery by Direct and Indirect Purchasers

In addition to ignoring this Court's admonition against engaging in "pass-on" analyses, the Seventh Circuit's decision supports duplicative recovery by direct and indirect purchasers. By conditioning the right of indirect purchasers to sue on the existence of a settlement between the alleged price-fixing manufacturers and the direct-purchasing wholesalers, the Seventh Circuit permitted multiple levels of direct and indirect purchasers to sue for the same overcharge damages, making duplicative recoveries almost inevitable.

This result flies in the face of this Court's policy to concentrate recovery (and the incentive to sue) in one level of plaintiff — the direct purchaser — and ignores this Court's repeated instruction that the rules on direct and indirect-purchaser standing must serve to "eliminate multiple recoveries," *Utilicorp*,

497 U.S. at 212, or even "a serious risk of multiple liability for defendants," *Illinois Brick*, 431 U.S. at 730. The Seventh Circuit's position also sets it apart from the other circuits, which have followed *Illinois Brick* and only allowed one level of plaintiff to sue for overcharge damages. For example, most recently, the Tenth Circuit recognized that "courts apply the *Illinois Brick* rule to bar the indirect or secondary purchasers' claims because the intermediary direct purchaser is not precluded from bringing a similar claim." *Sports Racing Servs., Inc.*, 1997 WL 686013, at *11; *see also, e.g., Shamrock*, 729 F.2d at 1211-14.

When settling a price-fixing claim, antitrust defendants reasonably expect (under *Illinois Brick*) to extinguish *all* liability flowing from the alleged overcharge. They certainly do not expect to trigger further litigation with indirect purchasers involving complex pass-on issues, on the one hand, or to expose themselves to the risk of multiple recovery on the other. But this is what antitrust defendants in the Seventh Circuit may look forward to if this decision is permitted to stand.

C. The Seventh Circuit's Opinion Dramatically Reduces a Direct Purchaser's Incentive to Sue

It is fundamental to the *Hanover Shoe*, *Illinois Brick* and *Utilicorp* line of cases that antitrust enforcement is furthered by handing a powerful incentive to the direct purchaser from the alleged conspirators, who can proceed secure in the knowledge that remote purchasers will not claw back some part of the recovery. *Illinois Brick*, 431 U.S. at 745-46. This Court recognizes that direct purchasers may not always take advantage of the incentive, but has repeatedly rejected arguments about the alleged "reluctance" of direct-purchasing middlemen to sue their suppliers, in favor of a bright-line test that establishes at the outset of the litigation who may be the plaintiff. *Id.* at 746.[15]

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[15] In any event, this is not an industry in which the direct purchasers are afraid to sue. In the past, pharmaceutical wholesalers have been perfectly willing to bring price-fixing claims against drug manufacturers. *See West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 746 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079

The Seventh Circuit's ruling here seriously dilutes a direct purchaser's incentive to break out of an alleged cartel and sue for damages. For, by doing so, the direct purchaser exposes itself to a lawsuit from indirect purchasers who will then assert the newly created exception to *Illinois Brick*, thus threatening to wring out of the direct purchaser any damages it may have recovered from the conspiring manufacturers.

II. THE SEVENTH CIRCUIT'S OPINION WILL OPEN THE FLOODGATES TO INDIRECT-PURCHASER LITIGATION

The Seventh Circuit's opinion in this case affords a roadmap for plaintiffs looking for a detour around the *Illinois Brick* wall: just sue the middlemen, claiming that they aided and abetted the conspiracy.

In virtually any case where the indirect purchasers have enough "evidence" of manufacturer conspiracy to draft a complaint, avoid Rule 11 sanctions, and survive summary judgment, they will also have a viable argument that the direct-purchasing middlemen were "on notice" of those very same facts. But under the Seventh Circuit's approach, the middlemen will be damned if they do take action themselves, and damned if they do not. If they *do* file an antitrust case, indirect purchasers can sue as soon as the direct purchasers reach a settlement. If they *do not* file suit — notwithstanding their being "on notice" of the relevant information — it will be little trouble for the indirect purchasers to place some sinister construction on the wholesalers' failure to act. That, plus the inevitable price-related conversations between buyers and sellers,[16] will provide a neat and convenient method to survive summary judgment despite the general rule barring

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(2d Cir.), *cert. denied*, 404 U.S. 871 (1971); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 395, 398 (D.D.C. 1978).

[16] This Court has recognized that "[a] manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market," *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762 (1984), and has cautioned against inferring a price-fixing conspiracy from such "highly ambiguous evidence." *Id.* at 763.

antitrust claims based on indirect purchases. *Hanover Shoe*, *Illinois Brick* and *Utilicorp* will effectively have been overruled.[17]

III. PUBLIC POLICY MILITATES AGAINST DEPARTING FROM THE *ILLINOIS BRICK* RULE

Where the *Illinois Brick* doctrine bars an indirect purchaser's overcharge damage claim, purported equitable considerations cannot dictate a contrary result, lest the courts become bogged down in litigating a series of exceptions. As set forth above, there is no authority supporting the new exception created by the Seventh Circuit. Nor do the equities of this case favor the creation of such an exception.

A. Retail Pharmacies Practice the Same Type of Price Differentiation Themselves and Likely Pass on a Portion of Any Putative Overcharge

In response to the power of managed care, retail pharmacies (like pharmaceutical manufacturers and other providers of healthcare goods and services) accept lower payments from patients of managed-care plans than from cash paying customers. (Doc. 2047 at ¶ 33.) Thus, Respondents themselves engage in pricing practices that are similar to those they challenge in this litigation.

Moreover, while Respondents will seek to avoid the *Illinois Brick* bar to their own claims, they no doubt also will use every effort to avail themselves of *Hanover Shoe*'s prohibition against any inquiry into how much of their claimed "overcharge damages" they themselves passed on to consumers. *See West*

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[17] Indeed, the first such new crack in the *Illinois Brick* wall may have already occurred, two months after the Seventh Circuit opinion was issued in this case. In *Rozema v. The Marshfield Clinic*, 977 F. Supp. 1362 (W.D. Wis. 1997), the court held that indirect purchasers' antitrust claims would not be barred under *Illinois Brick* because the direct-purchasing middlemen were alleged to be coconspirators. *Id.* at 1375. The court supported this conclusion simply by citing the Seventh Circuit's opinion at issue here, and without any analysis of the key *Illinois Brick* factors, such as the necessity of a pass-on analysis and whether the direct purchasers also had a cause of action. *Id.*

Virginia v. Chas. Pfizer & Co., 314 F. Supp. at 728, 745-46 (recognizing that retail druggists pass-on some portion of price increases). Carried to its logical conclusion, the reasoning of the Seventh Circuit would permit a federal Sherman Act claim by an indirect-purchasing consumer. The consumer could simply allege that the retailers, too, were part of the vertical conspiracy (however unwillingly) and that he or she was the direct purchaser from the cartel.

This Court has held, however, that "the reasoning of *Hanover Shoe* cannot justify unequal treatment of plaintiffs and defendants with respect to the permissibility of pass-on arguments." *Illinois Brick*, 431 U.S. at 731. There is no reason to depart from that rule in this case.[18]

B. Alleged Wholesaler "Complicity" Does Not Justify Abandonment of Compelling Policy Considerations

This Court held in *Perma Life Mufflers* that alleged antitrust conspirators may sue upstream coconspirators, at least where they have a subordinate role in the challenged activities. 392 U.S. at 139-40. Strong policy reasons underpin this holding, namely, encouraging reluctant downstream participants in a vertical conspiracy to break out of the inappropriate activity. *See, e.g., Blackburn* v. *Sweeney*, 53 F.3d 825, 829 (7th Cir. 1995). The Seventh Circuit acknowledged this purpose as well, and made clear that, at most, the wholesalers were "reluctant accomplices" in the alleged conspiracy. Accordingly, the Seventh Circuit noted that the wholesalers were "entitled" to sue for damages. 123 F.3d at 615 (App. 27a). Thus, even assuming (contrary to fact) that there *was* a conspiracy and the wholesalers *were* cats–paws, there was no reason for the Seventh Circuit to abandon the policies underlying both *Illinois Brick* and *Perma Life Mufflers*.

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[18] Even if Respondents cannot recover damages based on their indirect purchases, if they prevail they may still recover damages based on their direct purchases, which are substantial.

C. The Courts Should Not Twist *Illinois Brick*'s Policy Out of Shape to Accommodate an Economically Implausible Theory: That Wholesalers Conspired to Pay Higher Than Competitive Prices

Unlike the typical antitrust case (in which participants are accused of colluding to charge higher than competitive prices), here the wholesalers are accused of conspiring to *purchase* from their suppliers at a supracompetitive price. Such behavior is contrary to self-interest, and such a theory of liability makes little sense. There is scant danger indeed that reversing the Seventh Circuit's decision would serve to immunize a rash of conspiratorial activity, as middlemen rush to conspire with manufacturers to inflate prices at the manufacturer level.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

January 5, 1998

Respectfully submitted,

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